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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

FRANK A. GOGUEN et al., Plaintiffs and Appellants, v. ALLSTATE INSURANCE COMPANY, Defendant and Respondent.	B141898 (Super. Ct. No. LC043139)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary Ann Murphy, Judge. Affirmed in part and reversed in part.

Law Offices of Brifman & Bailey, Mark Brifman, Mark C. Bailey; Lynberg & Watkins, Norman J. Watkins and Ruth Segal for Plaintiffs and Appellants.

MacGregor & Berthel, Gregory Michael MacGregor and Deborah A. Berthel for Defendant and Respondent.

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This action arises from the 1994 Northridge Earthquake, which by some estimates, as our Supreme Court noted in *Vu v. Prudential Property & Casualty Ins. Co* (2001) 26 Cal.4th 1142, 1146, caused $15.3 billion in damages and spawned 600,000 insurance claims. Here, appellants Frank and Nancy Goguen asserted claims against Allstate Insurance Company (Allstate) for, inter alia, breach of insurance contract, bad faith, negligent supervision, and negligent misrepresentation, alleging that Allstate improperly permitted a contractor to usurp insurance proceeds owed to them. The trial court granted summary judgment on their first amended complaint. We affirm in part and reverse in part.

FACTS

There were no material disputes about the following facts on summary judgment. In 1994, the Goguens held an Allstate homeowner insurance policy, which included earthquake coverage. The policy limit for damage to the dwelling was $163,000, plus "10% additional protection . . . for other structures."

In early January 1994, the Northridge Earthquake damaged their house in Calabasas. Allstate's adjuster on the Goguens' subsequent claim during the pertinent period was Harry Booth. Allstate initially retained the engineering firm of Hudson International to assist in assessing the Goguens' claim. Hudson International concluded that some of the claimed damage was preexisting.

In a letter dated May 27, 1994, the Goguens disputed this conclusion and suggested that they might consider legal action. Allstate assigned Tom Conrad of Western States Geotechnical (Western), an engineering firm, to provide another engineering report. Conrad was also the owner of Construction Diagnostics, Inc (CDI).

Western determined that the house was unsafe. The Goguens moved out of the house, and in June 1994, Allstate began paying them additional living expense

(ALE) benefits under their policy. In September 1994, Western submitted a report to Allstate stating that the house's foundation was damaged, and that a retaining wall on the property needed buttressing.

On November 15, 1994, Frank Goguen and Conrad executed an agreement that provided that CDI would serve as the Goguens' contractor. The agreement contained the following provisions: "As further consideration to CDI, should owner have insurance coverage applicable to the work of CDI, owner hereby agrees to irrevocably assign the proceeds of said insurance coverage to CDI as a means of payment for CDI's work. [¶] Further, owner hereby irrevocably appoints CDI as its agent and attorney in fact for the purpose of negotiation with owner's insurance carrier, relating to any and all claims owner may possess against said insurance policy arising in connection with the work to be performed by CDI."

On November 15, 1994, Frank Goguen and Conrad also signed a second handwritten document containing the following statements: ". . . Thomas Conrad shall split all monies 50/50 [¶] Less Cost of Repair [¶] . . . If Allstate pays [¶] 525,883.40 [¶] 100,000.00 Goguen [¶] 100,000.00 Thomas Conrad [¶] $325,883.40 Towards Repair [¶] Conrad & Goguen shall decide scope upon agreement to pay by Allstate."

On the same date, CDI sent an estimate to Allstate indicating that repairing the damage to the Goguens' house would cost $525,883.40. The original estimate was that the repairs would take one and one-half years to complete. In January 1995, Western submitted a supplemental report to Allstate indicating that the house's walls were out of plumb, and recommending that the entire ceiling and roof system should be replaced. In September 1995, Western sent Allstate a report entitled "Summary of Compaction Grouting," which stated that compaction grouting had been completed on September 12, 1995.

Allstate eventually issued checks totaling approximately $542,000. In addition, Allstate paid the Goguens $78,414.52 in ALE benefits over a two and one-half year period. CDI never completed the repairs on the Goguens' house.

RELEVANT PROCEDURAL HISTORY

The Goguens initiated this action against Allstate in November 1997. On April 14, 1998, they filed a first amended complaint against Allstate, Conrad, Western, and several other parties. Regarding Allstate, the complaint asserted claims for violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961 et seq.), unfair business practices (Bus. & Prof. Code, § 17200 et seq.), breach of insurance contract, bad faith, negligent supervision, and negligent misrepresentation. The complaint alleged, inter alia, that Conrad and Western were Allstate's agents, Allstate knew that Conrad, Western, and several other defendants had prepared numerous false engineering reports, and Allstate permitted Conrad and Western to fail to complete the repairs on the Goguens' house.

On January 28, 2000, Allstate filed its motion for summary judgment or adjudication on the first amended complaint. In lieu of summary judgment, the motion sought summary adjudication on separate claims against Allstate, as well as on the defenses asserted by Allstate in its answer. Following a hearing, the trial court granted summary judgment on March 13, 2000. Judgment was entered against the Goguens on April 5, 2000.

DISCUSSION

The Goguens contend that summary judgment was improperly granted.

A. *Standard of Review*

"A summary adjudication motion is subject to the same rules and procedures as a summary judgment motion. Both are reviewed de novo. [Citations.]" (*Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 819.)

"A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. [Citation.]" (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) "'Review of a summary judgment motion by an appellate court involves application of the same three-step process required of the trial court. [Citation.]'" (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.) The three steps are (1) identifying the issues framed by the complaint, (2) determining whether the moving party has made an adequate showing that negates the opponent's claim, and (3) determining whether the opposing party has raised a triable issue of fact. (See *ibid*.)

These steps reflect a series of burden shifts. A defendant moving for summary judgment has the burden of "negat[ing] a necessary element of the plaintiff's case, and demonstrat[ing] that under no hypothesis is there a material issue of fact that requires the process of a trial. [Citation.]" (*Molko v. Holy Spirit Assn., supra,* 46 Cal.3d at p. 1107.) To do that, the defendant may rely either on affirmative evidence or discovery responses of the plaintiff showing the absence of evidence necessary to establish at least one essential element of the plaintiff's case. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 589-590.) Once the defendant carries this substantive burden, the burden shifts back to the plaintiff to show that a triable issue of one or more material facts exists as to the plaintiff's

case. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.) All doubts as to whether there are any triable issues of fact are to be resolved in favor of the party opposing summary judgment. (*Ibid.*)

Finally, when, as here, a respondent sought summary adjudication on appellants' causes of action as an alternative to summary judgment, we may conclude that summary adjudication is proper on any of the causes of action that fail for want of a triable issue of fact or are abandoned on appeal.[1] (*Yu v. Signet Bank/Virginia* (1999) 69 Cal.App.4th 1377, 1397-1398; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

B. *Evidentiary Objections*

At the threshold of our inquiry, we address a dispute between the parties about the domain of evidence relevant to our review of the grant of summary judgment.

Deposition transcripts may be used on summary judgment unless admissibility objections to them are sustained by the court. (*Gatton v. A.P. Green Services, Inc.* (1998) 64 Cal.App.4th 688, 692.) However, a party's failure to obtain rulings on its objections may constitute a waiver of those objections. (*City*

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[1] Here, the Goguens' opening and reply briefs are devoid of any argument concerning the propriety of summary judgment or adjudication regarding their claim for unfair business practices. (Bus. & Prof. Code, § 17200 et seq.) They have, therefore, abandoned this claim. (See *Johnson v. United Services Automobile Assn.* (1998) 67 Cal.App.4th 626, 632, fn. 2*; Tan v. California Fed. Sav. & Loan Assn.* (1983) 140 Cal.App.3d 800, 811.)

We also observe that the motion for summary judgment did not challenge or refer to the RICO claim in the first amended complaint. However, nothing in the record or briefs clarifies the manner in which this claim was resolved. Because the Goguens do not raise any contentions of error on appeal regarding the disposition of this claim, they have waived all such contentions regarding their RICO claim.

of Long Beach v. Farmers & Merchants Bank (2000) 81 Cal.App.4th 780, 783-785.)

Here, Allstate contends that the trial court sustained its evidentiary objections to excerpts from several depositions taken in other actions that the Goguens submitted in support of their opposition to summary judgment. By contrast, the Goguens contend that these depositions were admissible as evidence, and that Allstate waived its objections to them at the hearing on the motion for summary judgment.[2]

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[2] On this matter, the record discloses that on January 26, 2000, shortly before Allstate filed its motion for summary judgment, the Goguens sought an order permitting depositions taken in other actions, including depositions from Conrad and Booth, to be used as if they were taken in the present case. Allstate opposed the motion on several grounds, including Code of Civil Procedure section 2025, subdivision (u), which governs the use in an action of depositions taken in another action. The trial court denied the Goguens' request.

Subsequently, the Goguens submitted excerpts from the same depositions in connection with their opposition to summary judgment. Allstate again objected to the use of these excerpts.

After the presentation of arguments at the hearing on the motion for summary judgment, the trial court stated that it would grant the motion. Gregory MacGregor, counsel for Allstate, reminded the trial court of its evidentiary objections, and the trial court replied: "Depositions from other cases are hearsay. They are not being considered." MacGregor agreed that that was Allstate's "evidentiary motion," but pressed for a formal ruling. The trial court asked counsel for the Goguens for any applicable hearsay exception. Citing provisions of Code of Civil Procedure section 2025, subdivision (u), counsel replied that they were admissible as statements by a party or employee of a party.

The following exchange then occurred:

"THE COURT: Just to the moving party, what difference does this make? Do you really want me to spend an hour going through and asking you questions as to whether they're really statements by a party? Do you really want me to do that?

"MR. MAC GREGOR: Put it that way --

"THE COURT: And your answer is?

"MR. MAC GREGOR: The answer would be no, Your Honor.

"THE COURT: Thank you. [¶] Motion's granted. . . ."

It is unnecessary for us to resolve this dispute. Little of the deposition testimony in question was properly cited in the Goguens' separate statement of facts, and thus most of the deposition testimony falls outside the scope of our review. Furthermore, to the extent that it is properly cited in the Goguens' separate statement of facts, its presence does not disturb summary judgment with respect to the claims to which it is pertinent.

As the court explained in *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 30-32, a party opposing summary judgment must identify pertinent issues and evidence in its separate statement of facts, and not solely in its opposition memorandum or other documents. Here, the Goguens cited the deposition excerpts as support for their complex argument, developed in their memorandum of points and authorities, that Allstate was aware in the fall of 1994 that Conrad and others were providing falsified engineering reports.

The record thus indicates that the trial court concluded it would have to conduct a lengthy hearing to rule on Allstate's objections. Faced with this prospect and the trial court's indication that the evidentiary rulings would not affect its decision on summary judgment, MacGregor did not press further for these rulings.

We observe that the trial court erred in concluding that resolution of pertinent hearsay objections here required a hearing on whether the deponents were parties or employees of a party. Evidence Code sections 1290 through 1292, rather than Code of Civil Procedure section 2025, subdivision (u), govern the admissibility in an action of deposition testimony from another action. (See Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1995 ed.) foll. § 1290, p. 370.) Both sections provide that prior testimony is inadmissible hearsay unless the declarant is unavailable as a witness. (Evid. Code, § 1291, subd. (a), § 1292, subd. (a).)

Here, the Goguens made no showing that the deponents were unavailable as witnesses, and thus Allstate's objections would have been properly sustained. (*Gatton v. A.P. Green Services, Inc., supra,* 64 Cal.App.4th at pp. 690-692.) Accordingly, the remaining issues concern whether MacGregor's apparent withdrawal of the objections following the trial court's incorrect ruling was a "defensive action," rather than a waiver. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 393, pp. 443-444.) For the reasons cited in the text, it is unnecessary for us to resolve these issues.

However, the Goguens' separate statement cites only a minute portion of the deposition excerpts to raise disputes about factual claims made by Allstate. Aside from this, the Goguens' separate statement makes conclusory claims about Allstate's alleged awareness of Conrad's fraud without citation to any evidence.

At the hearing on the motion for summary judgment, the trial court reminded counsel for the Goguens of their obligation to set forth the relevant evidence in their separate statement, stating, "You're supposed to set forth in each separate opposing statement what your evidence is. I can't read minds here." As the court noted in *North Coast*: "'[I]t is no answer to say the facts set out in the supporting evidence or memoranda of points and authorities are sufficient. "Such an argument does not aid the trial court at all since it then has to cull through often discursive argument to determine what is admitted, what is contested, and where the evidence on each side of the issue is located."' [Citations.]" (*North Coast Business Park v. Nielsen Construction Co., supra*, 17 Cal.App.4th at p. 30, quoting *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 335.)

In view of *North Coast*, we limit our review to the portions of the deposition excerpts properly identified in the Goguens' separate statement. This evidence is material to summary judgment only with respect to the Goguens' claims for breach of insurance contract, bad faith, and negligent supervision. As we explain below, none of the evidence cited in the separate statements raises triable issues of fact regarding these claims, and thus summary judgment was proper on them.[3]

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[3] On a related matter, it is also unnecessary for us to address the Goguens' contention that the trial court failed to issue an adequate statement of reasons. (Code Civ. Proc., § 437c, subd. (g).) Because our independent review establishes that summary judgment was properly granted on some, but not all, causes of action, and the Goguens have not identified any prejudice from the purported error, any such error was harmless. (See *Soto v. State of California* (1997) 56 Cal.App.4th 196, 199.)

C. *Breach of Insurance Contract and Bad Faith*

The crux of the Goguens' claims for breach of insurance contract and of the covenant of good faith is that Allstate had recommended Conrad to them as a contractor, and that Conrad inflated his estimates of damage, persuaded the Goguens to engage in unnecessary repairs, and then usurped most of the proceeds paid to repair the house.

In *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, our Supreme Court clarified that in an insurance contract, "the covenant [of good faith and fair dealing] is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the other party's rights to the benefits of the agreement. [Citation.]" (*Id*. at p. 36.) On this matter, the *Waller* court cited the reasoning in *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, which the court summarized as follows: "[W]hen benefits are due an insured, 'delayed payment based on inadequate or tardy investigations, oppressive conduct by claims adjusters seeking to reduce the amounts legitimately payable and numerous other tactics may breach the implied covenant because' they frustrate the insured's right to receive the benefits of the contract in 'prompt compensation for losses.' [Citation.] Absent that contractual right, however, the implied covenant has nothing upon which to act as a supplement, and 'should not be endowed with an existence independent of its contractual underpinnings.' [Citation.]" (*Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal.4th at p. 36.)

We discern guidance regarding the issues before us in *Rattan v. United Services Automobile Assn*. (2000) 84 Cal.App.4th 715. In *Rattan*, a married couple's home was damaged by fire, and they hired one of their insurer's "preferred contractors," whose work the insurer agreed to guarantee. (*Id*. at p. 717.) The married couple subsequently found deficiencies in the repaired home, and they sued their insurer for breach of insurance contract and bad faith. (*Id*. at p. 718.) After a

jury found that the insurer had not breached its insurance contract, the married couple contended on appeal that the jury should have instructed on principles of agency, contending that the evidence supported the conclusion that the contractor repaired their home as the insurer's agent.

The court in *Rattan* rejected this contention, reasoning that the instructions, as proposed, would have misled the jury. (84 Cal.App.4th at pp. 721-723.) Observing that the contractual arrangements by which the married couple hired the contractor were *separate* from the insurance policy, the *Rattan* court reasoned that the proposed instructions improperly suggested that a breach of the former arrangements would have necessarily been a breach of the insurance policy or an act of bad faith. (*Ibid*.) In so reasoning, the *Rattan* court noted that in special circumstances, an insurer may be liable in bad faith when the contractor serves as the insurer's agent for the purpose of providing policy benefits. (*Id*. at p. 723.)

Under the rationale in *Rattan*, an insurer is not liable for breach of an insurance contract or bad faith unless the conduct of the contractor hired by the insureds amounts to denial or delay of *policy* benefits *by the insurer*. Here, Allstate argued that the policy lacked any provisions requiring Allstate to select, police, or guarantee the performance of any contractor. Allstate also pointed out that the November 15, 1995, agreement that made CDI the Goguens' agent contains *no* representation that Allstate regarded CDI as its agent or guaranteed CDI's performance.

In addition, Allstate submitted evidence that Booth denied recommending CDI to the Goguens, and that it had paid more than the policy limits in ALE benefits and funds to repair the Goguens' house. It cited deposition testimony by Frank Goguen, who stated that Allstate had paid sums sufficient to repair his house and to support him and his wife while they lived elsewhere.

In response, the Goguens argued that there were triable issues as to whether (1) Allstate had properly paid dwelling coverage benefits *to* the Goguens, and whether (2) Conrad was Allstate's agent while he acted as their contractor. We do not discern material triable issues on these matters.

Regarding item (1), the Goguens contended that the three checks in question issued by Allstate were made payable to entities other than the Goguens. However, the checks themselves disclose that Allstate issued the first check to the Goguens, CDI and other entities, the second check to the Goguens and CDI, and the third check to the Goguens and Western.[4] The evidence cited by the Goguens indicates only that in some instances, the Goguens and other entities endorsed the checks. Furthermore, it is undisputed that Frank Goguen received between $60,000 and $80,000 of the proceeds after electing not to make some of the estimated repairs. In our view, the evidence here does not raise a triable issue regarding whether Allstate properly paid benefits to them.

On a related matter concerning item (1), the Goguens contended that their endorsements on the third check were forged, and they suggested that this forgery, which (presumably) was by Conrad, doing business as Western, was a breach of the insurance policy or act of bad faith by Allstate. We are not persuaded.

The parties do not dispute that Allstate issued the third check for $116,190.84 in October 1995, and that Allstate had already issued two other checks totaling $426,000, for repairs to the house, well in excess of the $163,000 dwelling coverage limit in the policy. For this reason, the Goguens cannot show that any conduct regarding the third check by Conrad, doing business as Western, amounted to a breach of the policy or bad faith conduct by Allstate. (See *Love v. Fire Ins. Exchange, supra*, 221 Cal.App.3d at pp. 1151-1152 & fn. 10.)

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[4] The third check was ostensibly to pay for a supplemental grouting claim.

Regarding item (2), the Goguens contended that Conrad, through CDI, was Allstate's agent while CDI served as the Goguens' contractor. Relying on the doctrine of ostensible agency, they argue that Booth engaged in conduct that rendered Conrad Allstate's agent during this period.

As the court explained in *Petersen v. Securities Settlement Corp.* (1991) 226 Cal.App.3d 1445, 1452: "'"It is settled . . . that ostensible authority arises as a result of conduct of the principal which causes the third party *reasonably to believe* that the agent possesses the authority to act on the principal's behalf."' [Citation.] Significantly, '[o]stensible authority must be based *upon acts or declarations of the principal* and not the conduct or representations of the alleged agent.' [Citations.]" Thus, in *Petersen*, the court concluded that a stockbroker was not the ostensible agent of a clearing broker with respect to a stock transaction, reasoning that the clearing broker's communications and literature underscored its limited role in such transactions. (*Id*. at pp. 1451-1453.)

In support of their theory of ostensible agency, the Goguens cited deposition testimony from Booth. Booth testified that Allstate had a list of preferred contractors, and that he sometimes recommended contractors from the list. Booth further testified that he did not recommend Conrad to the Goguens, but he did not dissuade the Goguens from hiring CDI when they proposed this idea.

The Goguens also pointed to deposition testimony from Frank Goguen. Taken as a totality, the excerpts from this deposition cited in the separate statements contain the following testimony. According to Frank Goguen, Booth told him that he was free to select any contractor that he wanted, and then suggested Conrad. Booth also said that Conrad was experienced and familiar with Allstate's practices. Booth "gave [him] a very clear understanding that . . . [Conrad] was their No. 1 contractor, did most of their work, et cetera, et cetera." Although Frank Goguen was considering hiring another contractor,

he decided to use Conrad. After he hired CDI, he could not recall any conduct by Allstate or Conrad suggesting that CDI represented Allstate.

Regarding the relationship between Conrad and Allstate, Frank Goguen testified, "I thought there was some kind of -- that's a good word, 'affiliation,' relationship, but I couldn't put my finger on it." When asked why he had signed a separate agreement with CDI, Goguen testified, "I just figured that he had an independent business thing and that it was somehow, lack of a better word, subcontracted from Allstate. Somehow there was a relation there. I understand that he could have his own entity." Goguen also testified that he believed that Conrad represented Allstate.

Finally, the Goguens cited testimony from Conrad that Booth had prepared the November 15, 1994, agreement by which the Goguens hired CDI.

We cannot conclude that this evidence supports a reasonable inference of ostensible agency. Viewed in the light most favorable to the Goguens, Frank Goguen's testimony indicates only that Booth's remarks and the November 15, 1994, agreement gave him the indeterminate impression that Conrad, doing business as CDI, was somehow "affiliated" with Allstate, perhaps as an independent entity or subcontractor. On the basis of this impression, Frank Goguen concluded that in hiring CDI he was hiring Allstate. However, the November 15, 1994, agreement, which the Goguens contend was prepared *by Booth*, lacks any hint that CDI was Allstate's agent, and it expressly made CDI the Goguens' "agent and attorney in fact" for the purpose of repair negotiations. In our view, Booth's ambiguous remarks to Frank Goguen, coupled with the terms of the express agreement, could not be regarded by a reasonable insured as creating a dual agency whereby Conrad, doing business as CDI, was agent for both the Goguens and Allstate.

The Goguens also suggest that Booth rendered Conrad Allstate's agent when CDI submitted an inflated repair estimate that deceived the Goguens into permitting

unnecessary repairs. On this matter, they cited deposition testimony from Conrad that Booth prepared the $525,883.40 repair estimate submitted on November 15, 1994. In addition, they cited deposition testimony from Frank Goguen that he was unaware that CDI's estimate contained any inflated repairs.

Assuming (without deciding) that Booth made CDI an agent of Allstate in preparing the $525,883.40 estimate, nothing properly before us raises the reasonable inference that this estimate breached the insurance contract or amounted to bad faith. In paying this sum, Allstate exceeded the policy limits and provided sufficient funds to repair the house.

Furthermore, the separate statements do not indicate that the Goguens were otherwise injured by the estimate. The Goguens suggest that, unknown to them, the estimate was inflated, and thus they were deceived into undertaking more repairs than necessary. However, nothing in the separate statements supports the inference that the estimate was inflated in a manner that deceived the Goguens.

The only evidence mentioned in the separate statements that suggest the estimate was inflated is the document dated November 15, 1994, concerning the division of funds from Allstate between the Goguens and Conrad. Allstate contends that this document, on its face, raises the inference that the Goguens and Conrad *jointly* inflated the estimate so that they could share in the excess proceeds. Accordingly, the Goguens cannot adopt Allstate's inference to show that the estimate deceived them or otherwise injured them.

The Goguens' contrasting version of the intent of the November 15, 1994 document in question does not support the inference that the estimate was inflated. Frank Goguen testified that he was *unaware* of any fraud in the estimate, and he signed that document on the advice of Booth, who told him that the Goguens could properly decide to forego some repairs and use insurance proceeds in other ways.

Nothing in this version of the underlying events indicates that the estimate was inflated.[5]

Finally, the Goguens contended that Allstate made Conrad its agent by ratifying his misconduct. "Ratification is the subsequent adoption by one claiming the benefits of an act, which without authority, another has voluntarily done while ostensibly acting as the agent of him who affirms the act and who had the power to confer authority (Civ. Code, §§ 2310, 2312)." (*Reusche v. California Pac. Title Ins. Co.* (1965) 231 Cal.App.2d 731, 737.) Here, nothing in the separate statements suggests that Allstate benefited from Conrad's misconduct or otherwise approved of it.

In sum, there are no material triable issues as to whether conduct attributable to Allstate was a breach of the insurance policy or an act of bad faith. Summary judgment was therefore proper with respect to the claims for breach of insurance contract and bad faith.

D. *Negligent Supervision*

The Goguens allege that Allstate was negligent in supervising Conrad, who was Allstate's agent, and that Conrad, acting as Western and CDI, failed to repair the Goguens' house.

In our view, the claim for negligent supervision fails, to the extent that it rests on Conrad's conduct as the Goguens' contractor. We recognize that in some circumstances, an employer may hire out the services of an employee to another employer, thereby creating an arrangement in which the employee has two

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[5] In cursory terms, the Goguens also suggest that Western's engineering reports also encouraged them to engage in unnecessary repairs. However, nothing in the separate statements identifies any incorrect assertion in the reports whose falsity was unknown to the Goguens.

employers. (2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, §§ 118-119, pp. 113-114.) The original employer may nonetheless retain liability for the tortious conduct of the employee when it retains control over the employee. (*Ibid*.)

For the reasons cited above (see part C., *ante*), the Goguens' claim for negligent supervision fails for want of a triable factual issue, to the extent that it rests on the assumption that Conrad acted simultaneously as Allstate's agent and as the Goguens' contractor. There is no evidence that Conrad engaged in an act harmful to the Goguens while he acted in any such dual capacity.

Furthermore, the claim for negligent supervision fails, to the extent that it rests on the narrower theory that Allstate is liable for Conrad's alleged forgery of the Goguens' endorsement on the $116,190.84 check issued to the Goguens and Western in October 1995. Assuming (without deciding) that Western was Allstate's agent when the check was issued, "[n]o liability is incurred by the principal for acts of the agent beyond the scope of his actual or ostensible authority . . . ." (2 Witkin, Summary of Cal. Law, *supra*, § 78, at p. 80.) However, nothing in the separate statements indicates that Allstate authorized or ratified any fraudulent endorsement by Conrad, doing business as Western.

Summary judgment was therefore proper with respect to the claim for negligent supervision.

E. *Negligent Misrepresentation*

The Goguens contend that there are triable issues as to whether Allstate engaged in negligent misrepresentation in recommending Conrad to them as a contractor. We agree.

"Negligent misrepresentation is the assertion of a false statement, honestly made in the belief it is true, but without reasonable ground for such belief.

[Citations.] '[T]he broad statements that "scienter" is an element of every cause of action for deceit, and that an "intent to deceive" is essential, are untrue, since neither is a requisite of negligent misrepresentation. [Citations.]' [Citation.]" (*Anderson v. Deloitte & Touche* (1997) 56 Cal.App.4th 1468, 1476, fn. omitted.)

Here, Allstate contended that summary judgment was proper because there was no evidence that Allstate had recommended Conrad to the Goguens, or that they had relied on such recommendations to their detriment. This contention was narrowly focused on whether Allstate made representations about Conrad's merits or track record as a contractor, rather than on the truth of any such representations. Allstate's motion for summary judgment and separate statement lacks any suggestion that Conrad had performed well as a contractor before the Goguens hired CDI.

However, as we have described (see part C., *ante*), Frank Goguen testified that Booth recommended Conrad as Allstate's "No. 1 contractor," who was experienced and familiar with Allstate's practices. Frank Goguen also testified that he selected Conrad as a result of this recommendation. Finally, the Goguens' separate statement cited evidence that Conrad performed inferior repairs, abandoned the repairs, and absconded with a substantial amount of the insurance proceeds. Accordingly, there are triable issues regarding the existence of material misrepresentations and detrimental reliance.

Summary judgment was therefore improper with respect to negligent misrepresentation.[6]

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[6] The Goguens also suggest that there are triable issues as to whether Allstate engaged in intentional misrepresentation. However, the first amended complaint does not contain any such claim.

F. *Punitive Damages*

Finally, the Goguens contend that summary judgment was improper with respect to their request for punitive damages. We disagree. For the reasons cited above (see parts B., C., D., and E., *ante*), summary judgment was improper only with respect to their claim for negligent misrepresentation. However, negligent misrepresentation will not support an award of punitive damages. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1241.)

G. *Fraud by the Goguens*

Finally, Allstate contends that summary judgment is nonetheless proper because the Goguens submitted a fraudulent claim, and thus their policy is void. (See Ins. Code, § 2071; *Cummings v. Fire Ins. Exchange* (1988) 202 Cal.App.3d 1407, 1414-1419.) In support of this contention, Allstate cites the November 15, 1994, document signed by the Goguens and Conrad concerning the division of payments from Allstate. However, as we have indicated (see part C., *ante*), there are triable issues regarding whether the Goguens acted to defraud Allstate in connection with this document.

DISPOSITION

The summary judgment on appellants' first amended complaint is reversed with respect to the claim for negligent misrepresentation, and otherwise affirmed. The parties are to bear their own costs.

NOT TO BE PUBLISHED

CURRY, J.

We concur:

VOGEL (C.S.), P.J

HASTINGS, J.